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 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

16 INTERSERVE, INC. dba TECHCRUNCH, a
 Delaware corporation, and CRUNCHPAD,
 17 INC., a Delaware corporation,

18 Plaintiffs,

19 vs.

20 FUSION GARAGE PTE LTD., a Singapore
 company,

21 Defendant.

CASE NO. C 09-cv-5812 RS (PVT)

**FUSION GARAGE'S OPPOSITION TO
 PLAINTIFFS' MOTION TO COMPEL
 DE-DESIGNATION OF DOCUMENTS**

Date: June 22, 2010
 Time: 10:00 a.m.
 Judge: Hon. Patricia Trumbull

1 **I. INTRODUCTION**

2 Plaintiffs' Motion to Compel De-Designation seeks to de-designate 19 documents that
3 Fusion Garage produced in this litigation. Fusion Garage has no opposition to the de-designation
4 of 12 of these documents – specifically, the documents bearing Bates ranges FG29960-68;
5 FG30010-11; FG30068-73; FG30270-74; FG0029940; FG0029927-33; FG0008409-12;
6 FG0032834; FG0001160-61; FG0001308-09; FG0001319-20; and FG0029728-32.

7 However, Fusion Garage does oppose de-designation of the remaining seven documents
8 (bearing Bates ranges FG0007391-92; FG0013395-99; FG0029680; FG0013302-07; FG0013268-
9 69; FG0000243-46; and FG0032911), all of which are properly shielded under the Stipulated
10 Protective Order. These seven documents contain confidential information regarding Fusion
11 Garage's relationship with the original device manufacturer (ODM) of the JooJoo, the financial
12 terms of Fusion Garage's relationship with its public relations agency McGrath/Power, and Fusion
13 Garage's currently-pending plans to market the JooJoo. Plaintiffs' Motion should be denied as to
14 these seven documents.

15 **II. ARGUMENT**

16 Under the Stipulated Protective Order, information may be kept confidential if it
17 “qualif[ies] for protection under standards developed under F.R.Civ.P. 26(c).” (Dkt. 35 at 2). In
18 turn, Rule 26(c) allows that “confidential research, development, or commercial information not
19 be revealed or be revealed only in a specified way” in order “to protect a party or person from
20 annoyance, embarrassment, oppression, or undue burden or expense.” *Id.* At the May 13 hearing
21 regarding Fusion Garage's Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction,
22 Judge Seeborg specifically highlighted “revenue discussion” and “business plans going forward”
23 as types of information that may properly be sealed. (*See* Dkt. 144, Ex. A at 5). The seven
24 documents at issue here all qualify for Confidential status¹ in light of the Stipulated Protective
25 Order, Rule 26(c), and Judge Seeborg's comments at the May 13 hearing.

26 _____
27 ¹ Fusion Garage does not seek to shield any of these documents as Highly Confidential –
28 Attorneys' Eyes Only.

1 Plaintiffs cite *Culinary Foods, Inc. v. Raychem. Corp.*, 151 F.R.D. 297, 301 (N.D. Ill.
2 1993) and *Ideal Steel Supply Corp. v. Anza*, 2005 WL 1213848, *3 (S.D.N.Y. May 23, 2005) for
3 the proposition that the mere possibility of embarrassment is insufficient to keep documents
4 confidential under Rule 26. (Mot., 7). This proposition may be correct, but it is irrelevant here.
5 Fusion Garage is not attempting to shield any of the seven disputed documents on embarrassment
6 grounds. Rather, as discussed below, Fusion Garage seeks to shield these documents to protect:
7 (1) the viability of certain pending JooJoo marketing plans; and (2) the ability for McGrath and the
8 ODM to strike private contracts with their clients without disclosing these contract terms to
9 potential competitors, prospective clients, and other third parties.

10 ***Documents Regarding the JooJoo's ODM:*** FG0000243-46; FG0029680; and FG0032911
11 all disclose the name of the ODM whom Fusion Garage contracted to build the JooJoo. The
12 identity of the JooJoo's ODM is a sensitive piece of commercial information, and courts have
13 regularly ruled that this precise type of information may be kept confidential or even attorneys'
14 eyes only. *See, e.g., Key Components, Inc. v. Edge Elecs., Inc.*, 2008 WL 4937560, *5 (E.D.
15 Tenn. Nov. 17, 2008) (ruling that "the identity of the manufacturer(s) and/or supplier(s) of the
16 batteries at issue" be kept as Confidential- Attorneys' Eyes Only); *Drexel Heritage Furnishings,*
17 *Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255, 263 (M.D.N.C. 2001) ("defendants may produce the
18 information or documents which contain the identities of defendants' suppliers of products
19 manufactured by plaintiffs in a form which shall be viewed by plaintiffs' outside counsel's eyes
20 only").

21 Plaintiffs' argument for why the identity of the JooJoo's ODM should *not* be kept
22 confidential is that certain public FCC filings disclose this entity as the manufacturer of one small
23 *component* of the JooJoo. (Mot. at 7). Yet Plaintiffs do not – and, indeed, cannot – argue that the
24 FCC filings identify this entity as the ODM for the entire device. Rather, the identity of the
25 JooJoo's overall ODM has remained (and should remain) confidential. (*See Pennypacker Decl.*,
26 Ex. A (Rathakrishnan Dep.) at 63:24-25).

27 The documents labeled FG0000243-46, FG0029680, and FG0032911 should remain
28 confidential for the additional reason that they disclose the financial terms of Fusion Garage's

1 relationship with the ODM, such as the incentive structure that Fusion Garage provided to the
2 ODM (*see* FG0029680), the handling cost that the ODM charged Fusion Garage (*see* FG
3 0000244), and the down payment terms that the ODM asked for (*see* FG032911). These financial
4 terms are clearly protectable and may be kept confidential. *See, e.g., U2 Home Entm't, Inc. v.*
5 *KyLin TV, Inc.*, 2008 WL 1771913, *3 (E.D.N.Y. April 15, 2008) (“The licensing agreements do
6 contain financial terms, which have been ‘widely held’ to constitute ‘confidential business
7 information’ subject to a protective order”) (citation omitted). Fusion Garage and the ODM
8 should not be forced to have their contract terms disclosed to the general public, thereby allowing
9 potential competitors and prospective customers to see how they structure their deals.

10 ***Documents Regarding the Terms of the Fusion Garage – McGrath Relationship:***

11 Similarly, FG0007391-92 and FG0013268-69 disclose certain financial terms of Fusion Garage’s
12 contract with McGrath/Power. Like the financial terms of the Fusion Garage – ODM relationship,
13 the financial terms of the Fusion Garage – McGrath relationship are protectable and should be
14 kept confidential. *See U2*, 2008 WL 1771913 at *3. Indeed, McGrath’s CEO explains in his
15 accompanying declaration that McGrath has varying financial terms for each of its clients, and
16 McGrath’s business practice is to keep these terms private – both to protect their clients’ privacy
17 and to prevent prospective clients from seeking or demanding the same terms as current or past
18 clients. (Bloom Decl., ¶ 5).

19 ***Documents Regarding Fusion Garage’s Pending Marketing Plans:*** Finally, FG0013395-
20 99 and FG13302-07 disclose Fusion Garage’s and McGrath’s plans to market the JooJoo by
21 seeking the endorsement of a specific media personality. These plans are still pending – indeed,
22 McGrath is currently in confidential talks with the media personality’s representatives, and the
23 success of these talks would be jeopardized if it became public knowledge that Fusion Garage was
24 seeking the media personality’s endorsement. (Bloom Decl., ¶ 4). Accordingly, these still-
25 pending marketing plans are properly shielded as confidential. *See FTC v. Foster*, 2007 WL
26 2219410, *7 (D.N.M. April 26, 2007) (“confidential information includes trade secrets and
27 marketing plans”) (citing *Am. Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 740 (Fed. Cir. 1987)).
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1 Indeed, Judge Seeborg referenced "business plans going forward" as an example of the type of
2 information that may be kept confidential.

3 **III. CONCLUSION**

4 For the foregoing reasons, Fusion Garage respectfully requests that the Court deny
5 Plaintiffs' motion to remove the confidentiality designations from the documents bearing Bates
6 ranges FG0007391-92; FG0013395-99; FG0029680; FG0013302-07; FG0013268-69;
7 FG0000243-46; and FG0032911.

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DATED: June 3, 2010

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